NO. 80-1118

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES D. STANCIL
AND G & E BUSINESS SERVICES, INC.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the trial court judge abuse his discretion by refusing to qualify a witness as an expert where the witness had no scientific training, nor scientific background, nor relevant work experience and where she could not accurately testify on contemporaneous community standards since she did not live, work, or even visit the relevant community on a regular basis?

2.

May a trial court judge instruct the jury that they can consider whether sexually explicit materials were commercially exploited solely for the sake of their prurient appeal, in their determination of whether the materials were obscene, where the evidence shows that the materials were

pandered entirely on the basis of their sexual appeal?

3.

Is a state constitutionally required to define obscenity in terms of the hypothetical standard of community tolerance or may the state define obscenity in terms of "contemporary community standards?"

4.

Was the trial court's jury instruction on the knowledge required for a conviction under Ga. Code Ann. § 26-2101 constitutional?

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STATEMENT OF THE CASE

Petitioners, Stancil and G&E Business Services, Inc., were accused of violating Ga. Code Ann. § 26-2101 in separate one count accusations. Petitioner Stancil was an employee of G&E Business Services at the time of his arrest. Both Petitioners were tried before a jury in the State Court of Fulton County for distributing obscene materials. The trial commenced on November 19, 1979, and on November 21, 1979, a verdict was returned against both Petitioners.

Petitioner Stancil was sentenced to consecutive one-year imprisonment terms and a $5,000.00 fine on each of the four counts on which he was found guilty. Petitioner G&E Business Services, Inc. was fined $5,000.00 on each of the two counts on which it was found guilty. The

Georgia Court of Appeals affirmed the conviction and sentence as to each of the Petitioners, Stancil v. State, 155 Ga. App. 731, ___S.E.2d___(1980), and later the Supreme Court of Georgia denied Petitioners' petition for writ of certiorari whereupon the present petition for writ of certiorari was filed.

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA COURT OF APPEALS PROPERLY DECIDED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO QUALIFY DR. JUNE BUTTS AS AN EXPERT WITNESS.

Petitioner argues that he was unfairly denied the testimony of an expert witness in derogation of his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. Under Georgia law the opinions of experts on any question of science, skill, trade or similar questions are admissible, by either party. Ga. Code Ann. § 28-1710. However, such opinions of experts are only admissible from persons duly qualified as experts in the relevant field; such a requirement is hardly a denial of the Petitioner's due process rights.

The determination as to whether a person is qualified as an expert is a question of law to be decided by the trial judge. It is not to be overturned on appeal unless there was an abuse of discretion, or unless the determination was manifestly erroneous. United States v. Lopez, 543 F.2d 1156 (5th Cir.), cert. denied, 97 S.Ct. 1150, 429 U.S. 111, 51 L.Ed.2d (1976), United States v. King, 532 F.2d 505 (5th Cir.), rehearing denied, 536 F.2d 390 (1976); Barrow v. State, 235 Ga. 635, 221 S.E.2d 416 (1975).

It is well recognized that the trial judge possesses a broad discretion in passing upon the qualifications of an expert witness. United States v. Wysocki, 457 F.2d 1155, 1161 (5th Cir.) cert. denied, 409 U.S. 859, 93 S.Ct. 145, 34 L.Ed.2d 105 (1972); DeFreese v. United States, 270 F.2d 737 (5th Cir. 1959), cert. denied, 362 U.S.

944, 80 S.Ct. 810, 4 L.Ed.2d 772 (1960); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977). Great deference should be accorded the discretionary ruling of a trial court since it is uniquely suited to make determinations concerning the admissibility of expert testimony. Salem v. U.S. Lines Co., 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); United States v. Viglia, 549 F.2d 335 (5th Cir. 1977).

Petitioner contends that the trial court erroneously excluded the testimony of his proffered expert witness, Dr. June Butts. He objects mainly on the grounds that his purported expert was a social scientist and was thereby qualified as a scientist to give her opinion on the scientific value of the obscene magazines. The court specifically found that the witness was not competent to testify as to

the scientific value of the magazines because her background and training were not in science butwere instead in the field of education.

On direct examination the witness explained her educational background and training in "family life education" and in the general study of human sexuality. The witness also informed the court of her work experience as an educator and family life counselor. She admitted that she had not studied the natural sciences, was not a psychiatrist, psychologist, or medical doctor, and when asked by Petitioner's counsel how many articles she had read in the past ten years on the subject of human sexuality and explicit sexual materials she could only reply "maybe a dozen." (T. 144).

Petitioner also sought to have Dr. Butts qualified as an expert on the contemporaneous community standards of an average

person although she admitted that her only knowledge of the community standards in the metropolitan Atlanta area came from her once a year visit to Atlanta in which she visited relatives, classmates, and friends on social occasions. (T. 140).

On cross-examination out of the jury's presence, the witness' lack of competency as an expert was made even more obvious by counsel for the state when he clearly showed that the witness had no scientific training whatsoever, not even as a social scientist. Through the witness' own testimony he illustrated that her training was solely as an educator and counselor. (T. 147).

Moreover, as was noted by the Georgia Court of Appeals, Petitioner did not properly proffer any testimony of the witness on the issue of serious scientific

value. Stancil v. State, 155 Ga. App. 731, 733 (1980). At no time during the Petitioner's direct examination of the witness did he ask the witness what her opinion was as to the scientific value of the magazines, nor did he at anytime intimate what her answer would have been had the question been asked. Under Georgia law, a proffer is inadequate unless the witness' direct examination affords a basis for the assertion of error, by a showing as to what answers were expected, and that the trial judge was informed thereof. Barron v. Barron, 185 Ga. 346, 194 S.E. 905, (1938). Seaboard Air-Line Railway v. Vaughn, 19 Ga. 397, 91 S.E. 516 (1916); Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669 (1980). During her testimony, Dr. Butts did not indicate what her opinion was as to the scientific value of the magazines, therefore, it cannot now

be said that the denial of her testimony as an expert witness was harmful to the Petitioner's case, since it was possible, to the surprise of the Petitioner, that she would have stated that the magazines had no serious scientific value and were obscene.

On the issue of whether the Petitioner was harmed by the denial of any favorable expert testimony it has been held that when allegedly obscene materials are placed into evidence, the jurors' overall background, including their familiarity with their community standards, will render expert testimony unnecessary, if not irrelevant. United States v. Thomas, 613 F.2d 787 (7th Cir. 1980); United States v. 2,200 Paper Back Books, 565 F.2d 566 (7th Cir. 1977). Since the jurors are not bound by, and may totally disregard, an expert's testimony, Hamling v. United States,

4 S.Ct. 2887, 418 U.S. 87, 41 L.Ed.2d 590, rehearing denied, 95 S.Ct. 157, 419 U.S. 885, 42 L.Ed.2d 129 (1974), it is difficult to imagine how Petitioner could possibly have suffered any harm from the refusal to qualify Dr. Butts as an expert since it was doubtful at best that she could render an accurate assessment of the contemporaneous community standards of the community in that she neither lived nor worked in Atlanta or surrounding areas but merely visited on an annual basis. Furthermore, the traditional assistance of expert testimony, which is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand, is not needed by jurors in obscenity cases. Paris Adult Theatre I v. Slaton, 93 S.Ct. 2628, 413 U.S. 49, 37 L.Ed.2d 446, rehearing denied, 94 S.Ct. 27, 414 U.S. 881, 38 L.Ed.2d 128 (1973),

United States v. Thevis, 484 F.2d 1149, rehearing denied, 486 F.2d 1403, cert. denied, 94 S.Ct. 3223, 418 U.S. 932, 41 L.Ed.2d 1170 (1973); Cf. United States v. Sherpix, Inc., 512 F.2d 1361, 168 U.S. App. D.C. 121 (1975) (exclusion of all testimony on community standards would be inappropriate).

Moreover, the trial court allowed other expert testimony from a qualified local clinical psychologist on the subject of contemporaneous community standards and on the scientific value of the materials. (T. 176-239). Consequently, Petitioner's contention that he was unfairly denied the benefit of expert testimony is without merit.

B. GA. CODE ANN. § 26-2101(d) IS NOT VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The Petitioner alleges that Georgia Code Ann. § 26-2101(d) is violative of the U.S. Constitution. Section 26-2101(d) provides:

> (d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

Specifically, Petitioner contends that the trial court's charge on pandering under Ga. Code Ann. § 26-2101(d) would prohibit constitutionally protected freedom of expression.

The Georgia statute has been upheld in its entirety as a valid exercise of state power in regulating the commercial exploitation of obscene materials. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, rehearing denied 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128 (1973); Gable v. Jenkins, 309 F.Supp, 998 (N.D. Ga.), affirmed 397 U.S. 592, 90 S.Ct. 51, 25 L.Ed.2d 595 (1969); United States v. Thevis, 320 F. Supp. 714 (N.D. Ga. 1970). An identical version of the provision now challenged by the Petitioner was contained in the earlier Georgia statute which was before the Court in both Paris Adult Theatre I v. Slaton, supra, and Gable v. Jenkins, supra. In each of the above mentioned cases the courts held that the states could constitutionally impose prohibitions on the sale and distribution of obscene materials.

In Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), this Court upheld a federal prosecution and conviction for pandering obscene materials even though it was not established, and the court did not presume, that the materials were obscene in the abstract. In so holding this Court stated that although commercial activity in and of itself is no justification for narrowing the protection of expression secured by the First Amendment, that the materials were commercially exploited entirely on the basis of their prurient appeal could be considered in determining whether the materials were obscene. "Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech." 383 U.S. at 474, n. 17.

The Petitioner's argument that Ga. Code Ann. § 26-2101(d) would permit a conviction simply because the display in an adult bookstore consists of sexually explicit magazines is a patent mischaracterization of the statute. Ga. Code Ann. § 26-2101(d) is a narrowly defined section of the obscenity statute that will allow materials to be determined obscene if their distribution or the offer of distribution or the possession with the intent to distribute is a commercial exploitation of the material solely for its prurient appeal. Even a cursory reading of Ga. Code Ann. § 26-2101(d) reveals that the statutory language closely tracks the language of the Ginzburg decision. In accordance with Ginzburg, in addition to the tripartite test of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), material may be characterized as obscene

if it is commercially exploited solely for the sake of its prurient appeal.

This Court has on numerous previous occasions recognized the invalidity of constitutional challenges to the Georgia obscenity statute. See, e.g., Hays v. State, 243 S.E.2d 263, 145 Ga. App. 65, cert. denied, 439 U.S. 947, 99 S.Ct. 341, 58 L.Ed.2d 339 (1978); Hostetler v. State, 243 S.E.2d 256, 145 Ga.App. 55, cert. denied, 439 U.S. 947, 99 S.Ct. 341, 58 L.Ed.2d 339 (1978); Simpson v. State, 242 S.E.2d 265, 144 Ga. App. 657, appeal dismissed, 439 U.S. 887, 99 S.Ct. 241, 58 L.Ed.2d 233 (1978); Wood v. State, 249 S.E.2d 743, 144 Ga. App. 236, cert. denied, 439 U.S. 899, 99 S.Ct. 265, 58 L.Ed.2d 247 (1977), Sewell v. State, 233 S.E.2d 187, 238 Ga. 497, appeal dismissed, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1977).

Based upon the foregoing, it is evident that Petitioner's second ground presents no sufficient reason for issuing the writ.

In Paris Adult Theatre I v. Slaton, supra, this Court recognized that the states have a legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, so long as the regulations do not run afoul of specific constitutional guarantees. The Court held that the scope of the First Amendment does not compel the states to adopt a "lassez faire" policy and drop all controls on commercialized obscenity. In so holding, this Court noted that its previous decision in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), which held that a state criminal statute cannot impose criminal sanctions upon the mere

private possession of obscene materials, was restricted to the privacy of the home and could not be equated with, or extended to, the distribution of obscene materials to the public in a commercial establishment. Paris Adult Theatre I v. Slaton, supra.

As noted by the Court, the constitutionality of Ga. Code Ann. § 26-2101 had previously been challenged and upheld in Gable v. Jenkins, supra, on First Amendment and due process grounds. Paris Adult Theatre I, supra at 51, n.1. In Gable, the court found that the Georgia statute did not unconstitutionally violate the procedural due process principles of overbreath and vagueness, holding that since the statute carefully utilized the term "obscene materials," as it has been defined by the U.S. Supreme Court, there was no merit in the overbreath and vagueness challenges to it.

C. A STATE MAY CHOOSE TO DEFINE OBSCENITY IN TERMS OF "CONTEMPORARY COMMUNITY STANDARDS" WITHOUT REQUIRING A JURY CHARGE ON A HYPOTHETICAL STANDARD OF COMMUNITY TOLERANCE.

In Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), this Court set forth the substantive constitutional standards to be utilized in defining obscenity. The Court opined that one of the basic guidelines for the trier of fact is a threshold determination of whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. The Miller decision went on to specify that obscenity was to be determined by applying "contemporary community standards," not

"national standards," and that a state trial judge could constitutionally instruct the jury to apply a state community standard.

The question of permissible jury instructions on the application of contemporary community standards was further expounded on in Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). In Jenkins, an obscenity prosecution, under a previous Georgia obscenity statute, the trial court gave instructions directing the jury to apply "community standards" in determining obscenity, without specifying what "community." This Court responded to allegations that the charge was constitutionally erroneous, stating:

> Miller held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the Miller decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in Miller without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in Miller.

418 U.S. at 157.

Petitioner's reliance on passages from Pinkus v. United States, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978); Miller v. California, supra, and Smith v. United States, 431 U.S. 291, 98 S.Ct. 1756, 82 L.Ed.2d 324 (1972), for the

proposition that a trial judge must, as a matter of constitutional necessity, give jury instructions requiring that a finding of obscenity be made in light of the hypothetical "tolerance of the average person in the community" is misplaced. Neither of the above-cited decisions stands for the proposition that a trial court is constitutionally required to give "tolerance instructions." Quite to the contrary, the Miller and Jenkins decisions taken together stand for the proposition that a simple instruction on "contemporaneous community standards" without further specification is all that is constitutionally required in a state obscenity prosecution. Pinkus and Smith merely stand for the proposition that a jury must be instructed to consider the entire community and not simply their own

reactions, or the reactions of a sensitive or callous minority. Smith v. United States, 431 U.S. at 305; Pinkus v. United States, 436 U.S. at 296-99.

From the foregoing it is evident that the Petitioner's contentions regarding the constitutional necessity of "tolerance" instructions are in error. Accordingly, this ground presents no basis upon which certiorari can or should be granted.

D. THE JURY INSTRUCTION ON THE KNOWLEDGE REQUIRED FOR A CONVICTION UNDER GA. CODE ANN. § 26-2101 WAS CONSTITUTIONAL.

An essential element in the crime of distributing obscene materials in Georgia if that the accused knows the "obscene nature" of the material. Ga. Code Ann. § 26-2101(a). Knowing is defined as either actual knowledge of the obscene contents or "knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." Id. (At Petitioner's trial, the judge charged the jury concerning these principles.)

Previous appeals alleging that such a charge is unconstitutional have already been dismissed by this Court for want of a substantial federal question. See Sewell v.

Georgia, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed. 2d 76 (1977); Teal v. Georgia, 435 U.S. 989, 98 S.Ct. 1639, 56 L.Ed.2d 79 (1978); Simpson v. Georgia, 438 U.S. 887, 99 S.Ct. 241, 58 L.Ed.2d 233 (1978). Also this Court has recently denied writs of certiorari concerning this issue. Dyke v. Georgia, 421 U.S. 952, 955 S.Ct. 1687, 44 L.Ed.2d 106 (1974); Allen v. Georgia, 439 U.S. 899, 99 S.Ct. 264, 58 L.Ed.2d 247 (1978); United States v. Sherwin, 572 F.2d 196, cert. denied, 437 U.S. 909, 98 S.Ct. 3103, 57 L.Ed. 1140 (1977); see also, United States v. Cohen, 583 F.2d 1030 (7th Cir. 1978).

The trial court's charge is consistent with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when this Court held that the person charged with the offense

of mailing obscene material must know or have notice of the contents of the material.

> The inquiry, in proceedings under the [obscenity] statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails [Emphasis added].

Rosen v. United States, 161 U.S. 29, 41 (1896).

The Georgia statute is similar to New York statutes dealt with by this Court in Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966) and

Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

The Mishkin case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter", and it defined the required mental element in these terms:

> a reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . .

Mishkin v. New York, 383 U.S. at 510. See Ginsberg v. New York, 390 U.S. at 644.

Section 26-2101 of the Georgia Code requires "knowledge of facts which would

put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware." The statute dealt with in Ginsberg defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither Mishkin nor Ginsberg required actual knowledge of the obscenity of the material. Both cases were reviewed and followed in Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), where this Court construed 18 U.S.C. § 1461, and held:

> To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a

> formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the Constitution.

Id. at 123-24.

In the case of Kuhns v. California, 431 U.S. 973 (1977), this Court denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter . . . . " California v. Kuhns, 61 Cal. App.3d 735, 132 Cal. Rptr. 725, 737 (1976).

Petitioner concedes that proof of scienter may be made by circumstantial evidence. To prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of

knowledge of the character of the material by circumstantial evidence.

At Petitioner's trial, Georgia law required and the jury was instructed that the State had to prove, as a bare minimum, that Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" was required by Rosen v. United States, supra; "in some manner aware" was sufficient in Mishkin v. New York, supra; "reason to know" was sufficient in Ginsberg v. New York, supra; "be aware of the character of the matter" was sufficient in California v. Kuhns, supra; and proof of knowledge of the legal status of the material was not required. Hamling v. United States, supra.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Brief for the Respondent in Opposition upon the Petitioner by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Mr. James D. Stancil and
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This 8th day of April, 1981.

DARYL A. ROBINSON